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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the

COURT OF CRIMINAL APPEALS

of the

STATE OF TEXAS

THE STATE OF TEXAS, Petitioner

v.

SEAN MICHAEL MCGUIRE, Respondent

RESPONDENT'S BRIEF

FROM THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS AT AUSTIN
IN CAUSE NUMBER 01-18-00146-CR

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IDENTIFICATION OF PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1, a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

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State Prosecuting Attorney

Trial Court Judge:

The Honorable Brady Elliott, The Honorable Don Higginbotham

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondent was indicted for the first-degree felony offense of felony murder and the second-degree felony offense of intoxicated manslaughter for causing the death of the same person. (CR1: 12). On March 18, 2014, a jury found Appellee guilty of the offense of murder. (CR3: 562). On May 10, 2016, the First Court reversed Respondent's murder conviction pursuant to *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist] 2016). The State filed a petition for discretionary review which was refused

on November 2, 2016. *State v. McGuire*, No. PD-0948-16 (Tex. Crim. App. 2016). On February 23, 2018, the trial court granted Respondent's Motion to Suppress Evidence. (CRIII: 45). The State appealed and on August 29, 2019, the First Court of Appeal affirmed the trial court's ruling. *State v. McGuire*, No. 01-18-00146-CR (Tex. App.—Houston [14th Dist.]). The State filed a Petition for Discretionary Review on September 19, 2019.[1] *State v. McGuire*, No. PD-0984-19. On December 11, 2019, this Court granted the State's Petition for Discretionary Review as to the State's Grounds Numbers Two and Three.

STATEMENT OF FACTS

On August 1, 2010, an accident occurred and Respondent called Detective Bryan Leach and Chief Sheriff's Deputy Craig Brady to report that he hit someone or something, but when he looked for what or who it was, he did not see anything. (RR5: 18); (RR6: 83-84); (RR10: 54). Chief Brady contacted the Sheriff's Office dispatch. (RR10: 79). Trooper Devon Wiles and Trooper Alton Tomlin responded to the call. (RR5: 75-76); (RR7: 115).

At a pre-trial hearing held December 14, 2012, Trooper Devon Wiles testified that he did not have a warrant to arrest Respondent and that Respondent was not free to leave after he was placed in a patrol car minutes after Wiles arrived at a Shell gas station where he encountered Respondent the night of the alleged

[1] The undersigned was not actually served with the petition until September 20, 2019.

offense. (Pre-trial RR2: 112-13, 116, 118). Wiles testified that he did not observe Respondent commit an offense in his presence or view. (Pre-trial RR2: 112). At the pre-trial hearing, Wiles testified that Respondent smelled of alcohol, that his eyes were red and glassy, and that he was showing signs of intoxication. (Pre-trial RR2: 93). However, at trial, Wiles testified that when he arrived on scene, he never saw Respondent drink alcohol, there were no open alcoholic drinks, and that prior to Respondent's arrest, Respondent had not lost the normal use of his mental or physical faculties. (RR8: 34, 43-44). At the pre-trial hearing, Wiles testified that there was nothing suspicious about the location where he encountered Respondent and that Respondent was not acting in a suspicious manner. (Pre-trial RR2: 109-10). Wiles testified at trial that he had no evidence of any bad driving facts and Respondent was coherent and his responses were appropriate. (RR8: 42, 45).

Trooper Alton Tomlin testified at the pre-trial hearing, held on December 14, 2012, that Respondent was detained within five or ten minutes after law enforcement arrived on scene and that he was not free to leave. (Pre-trial RR2: 25, 53, 54, 55, 62). Tomlin testified further that he did not have a warrant to arrest Respondent. (Pre-trial RR2: 62). Tomlin testified that at the time of Respondent's arrest, there was no evidence as to who was at fault in the collision. (Pre-trial RR2: 59, 61). Tomlin stated specifically that he did not see Respondent commit

any crime in his presence. (Pre-trial RR2: 75). In addition, at trial, Tomlin testified that he had no evidence of an offense prior to Respondent's arrest. (RR5: 81). Tomlin testified that the location where he encountered Respondent was not a suspicious place. (Pre-trial RR2: 53).

According to dashboard camera video, Respondent was told he was under arrest at 1:01:33 a.m. on August 2, 2010, when Trooper Wiles placed Respondent in handcuffs and read Respondent his *Miranda*[2] warnings.

ARGUMENT & AUTHORITIES

I. The Court of Appeals did not err in holding that Texas Code of Criminal Procedure Article 14.03(a)(1) includes an exigency requirement.

In its first ground, the State asks this Court to consider the following question: "Does TEX. CODE CRIM. PROC. art. 14.03(a)(1) have an exigency requirement for warrantless arrests?" As a preliminary matter, Appellee points this Court to the record testimony that both officers who responded to this incident testified that the place where they encountered Respondent was not a suspicious place and they had no evidence that he had committed a crime. (Pre-trial RR2: 53, 109-10). Nonetheless, even assuming, for argument's sake alone, that the gas station in question was a suspicious place, Texas Code of Criminal Procedure Article 14.03(a)(1) includes an exigency requirement as discussed below.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

(a) Texas Code of Criminal Procedure Article 14.03 contemplates exigency.

In its first argument, the State contends that because the statute in question, Texas Code of Criminal Procedure Article 14.03(a)(1) does not use the word "exigency," the Legislature "purposefully excluded" an exigency requirement. *See* Petition at 9. The State then argues that, in contrast, the Legislature demonstrated its intent to include an exigency requirement when it amended Texas Code of Criminal Procedure Article 14.04 by "expressly" including "exigency." Petition at 7-8. However, the Legislature did not use the word "exigency" when it amended Texas Code of Criminal Procedure Article 14.04. *See* TEX. CODE CRIM. PRO. Art. 14.04. Instead, the legislature used the words, "there is no time to procure a warrant." TEX. CODE CRIM. PRO. Art. 14.04.

The same is the case here. Article 14.03(a)(1) contemplates exigency by stating a warrantless arrest is permitted when the circumstances reasonably show that a person is guilty of a felony or breach of the peace "or threaten, or are about to commit some offense against the laws;" which suggests there is no time to procure a warrant prior to the commission of an offense. TEX. CODE CRIM. PRO. Art. 14.03(a)(1). Simply because the statute does not include the word "exigency" is not persuasive that the Legislature "purposefully excluded" an exigency requirement. By the State's own admission, exigency can be required even when the word "exigency" is not included in the statute. *See* TEX. CODE CRIM. PRO. Art.

14.04. Regardless, it is the job of the Courts to interpret statutes and this Court has done so with respect to this issue, as discussed below. *See Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991).

(b) There is no "murkiness" concerning the holdings in *Swain* and *Gallups* and they should both be read to include an exigency requirement.

The State contends that this Court's holdings in *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005), *cert. denied*, 549 U.S. 861 (2006); and *Gallups v. State*, 151 S.W.3d 196 (Tex. Crim. App. 2004); which interpret Texas Code of Criminal Procedure 14.03(a)(1), constitute "murkiness" and also takes issue with Judge Cochran's concurrence in *Dyar v. State,* 125 S.W.3d 460 (Tex. Crim. App. 2003), Cochran, J., concurring. This Court's holdings are far from "murky" and Judge Cochran's explanation in *Dyar* corresponds with prior Supreme Court precedent.

In *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005), this Court instructed:

> Warrantless arrests in Texas are authorized only in limited circumstances and are governed primarily by Chapter 14 of the Code of Criminal Procedure. *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). Article 14.03(a)(1) authorizes the warrantless arrest of a person found in a suspicious place and under circumstances which reasonably show that an offense has been or is about to be committed. Any "place" may become suspicious when a person at that location and the accompanying circumstances raise a reasonable belief that the person has committed a crime and exigent circumstances call for immediate action or detention by police. *Gallups v. State*, 151

S.W.3d 196, 202 (Tex. Crim. App. 2004), *citing Dyar v. State*, 125 S.W.3d 460, 468-71 (Tex. Crim. App. 2003).

Swain v. State, 181 S.W.3d 359, 366 (Tex. Crim. App. 2005), *cert. denied*, 549 U.S. 861 (2006). In sum, this Court mandated that if the State argues that a place is suspicious, it is required to show a reasonable belief that a person has committed a crime and "exigent circumstances call for immediate action or detention by police." *Id*. There is nothing "murky" about that holding.

Likewise, in *Gallups v. State*, 151 S.W.3d 196 (Tex. Crim. App. 2004), the Court held that exigent circumstances are required to justify a warrantless search in a "suspicious place." *Gallups v. State*, 151 S.W.3d 196, 202 (Tex. Crim. App. 2004). The Court explained that Texas Code of Criminal Procedure provides for heightened protections in addition to those provided by the Fourth Amendment. *Id*. The Court held that a home was a suspicious place but also found the necessity that exigent circumstances existed to enter that home without a warrant. *Id*. Again, nothing "murky" about the Court's express holding.

In *Gallups*, this Court cited Judge Cochran's concurrence in *Dyar v. State*, 125 S.W.3d 460 (Tex. Crim. App. 2003). In her concurrence, Judge Cochran clarified that, in accordance with Fourth Amendment jurisprudence, exigent circumstances are required to justify a warrantless arrest in a suspicious place. *Id*. at 471. The State Prosecuting Attorney takes issue with Judge Cochran's acknowledgement of Fourth Amendment precedent, and argues essentially, that

Judge Cochran alone imposed an exigency requirement for warrantless arrests in suspicious places without any guiding framework.

However, also in *Gallups*, this Court cited *Welsh v. Wisconsin*, 466 U.S. 740 (1984), a United States Supreme Court case in which the High Court held that while probable cause had been established to believe the defendant had committed a crime, exigent circumstances did not exist to justify a warrantless arrest in his home. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). To act as if Judge Cochran invented the idea of exigent circumstances, with respect to warrantless arrests in "suspicious places," is misleading at best. This Court's thoughtful reliance on Constitutional principles should be upheld.

The State acknowledges the holdings in *Swain* and *Gallups*, but seeks to overturn them because, according to the State Prosecuting Attorney, a "public arrest" is constitutional and should not require a warrant. The assertion seems to be, as it was in oral argument at the Court of Appeals, that proof of exigency is not required to "pass constitutional muster." However, in *Minassian* v. State, the First Court of Appeals explained that even if the Fourth Amendment did not require exigency, Texas Code of Criminal Procedure Article 14.03(a)(1) does. *Minassian v. State*, 490 S.W.3d 629, 637 (Tex. App.—Houston [1st Dist.] 2016). This is because of the well-established principle that our State law provides for heightened protections in addition to those provided by the Fourth Amendment. *Id*.; TEX.

CONST. ART. I, Section 9.

The State seems to acknowledge this heightened protection, but then discounts it, by stating that Texans can be assured that police "discretion" is tempered by a magistrate's review within forty-eight hours. This contention suggests that an unconstitutional arrest is permitted for forty-eight hours. But, the analysis concerning the constitutionality of an arrest, focuses solely on the arrest, not a possible, subsequent release forty-eight hours later. It should go without saying that an unconstitutional arrest is still unlawful within the first forty-eight hours and the State Prosecuting Attorney should not be arguing in favor of the unlawful arrest of Texas Citizens for forty-eight hours at a time.

II. The Issue of Exigency has been extensively litigated and the reviewing Court found no exigent circumstances which would dispense with the warrant requirement.

In its second ground, the State asks this Court to consider the following: "If Article 14.03(a)(1) has an exigency requirement for a warrantless arrest in public, it was satisfied here because the integrity of blood-alcohol content evidence would have been compromised had Appellee been free to leave." As referenced above, Appellee would point this Court to the record testimony that both officers who responded to this incident testified that the place where they encountered Respondent was not a suspicious place. (Pre-trial RR2: 53, 109-10). This evidence was uncontroverted. However, even assuming, for argument's sake

alone, that the gas station in question was a suspicious place, the State is unable to show any exigent circumstances which would justify Appellee's warrantless arrest under Texas Code of Criminal Procedure Article 14.03(a)(1).

The State Prosecuting Attorney engages in a lengthy analysis of whether exigency was shown in this case by injecting her own interpretation of the facts and speculation. She attempts to re-litigate issues such as the officers' ability to obtain a warrant and the on-scene circumstances although those issues were litigated years ago. *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist] 2016).[3] The First Court of Appeals considered all of the evidence and testimony presented at Respondent's prior trial when it held:

> The State lists 24 facts that it argues establish exigent circumstances to justify the warrantless search. These include that the accident occurred late at night, McGuire was no longer at the scene when the police arrived and had to be brought back, the accident site needed to be secured and investigated, and officers needed to manage traffic in the area. Additionally, although prosecutors were on call day and night to assist officers with obtaining a warrant, the magistrates, themselves, were not "on call" and would have had to be located. The State notes that, on at least one occasion unrelated to this case, a judge could not be found to issue a warrant. But the evidence also establishes that the officers did not attempt to secure a warrant in this case. Officer Tomlin testified that he took "zero steps" to obtain a warrant to draw McGuire's blood. The State argues that it may have proven difficult to locate a judge to sign a warrant, but, without any effort to do so, the testimony is only speculation.

[3] As discussed above, the State filed a petition for discretionary review which was denied by this Court on November 2, 2016. *State v. McGuire*, No. PD-0948-16 (Tex. Crim. App. 2016). The State then filed a petition for writ of certiorari with the United States Supreme Court, but it was denied on May 30, 2017. *Texas v. McGuire*, No. 16-919.

> Having examined the totality of the circumstances, we conclude that the State failed to demonstrate an exigency to excuse the requirement of a warrant.

McGuire, 493 S.W.3d at 197-98. Clearly, the issue of exigency has been litigated, and extensively, at that. *Id*.

As for the State Prosecuting Attorney's argument that the integrity of Respondent's Blood Alcohol Content could be compromised by the dissipation of alcohol "supplied exigent circumstances," ignores the record in this case as well as United States Supreme Court precedent. As the First Court of Appeals correctly stated, "In 2013, the United States Supreme Court ruled that the dissipation of alcohol does not provide a *per se* exigency to relieve the State of the requirement of a search warrant when conducting an unconsented-to blood draw of a DWI suspect. *McNeely*, 569 U.S. at 155." *See* Opinion at 9. The Court continued:

> The State could not rely on McGuire's alleged intoxication to argue a *per se* exigency because, after *McNeely*, there is no per se exigency for dissipation of alcohol in a suspect's blood. 569 U.S. at 164; *see Donohoo*, 2016 WL 3442258, at *6 (relying on McNeely to reject State's argument for warrantless arrest under Article 14.03(a)(1) based on dissipation of suspect's blood-alcohol level, given that officers had testified they never sought warrant); see also *Bell*, 2019 WL 3024481, at *2 n.2 (in connection with holding that, under *Swain*, exigent circumstances must be shown, noting that the United States Supreme Court held, in *McNeely*, that "the natural metabolization of alcohol in the bloodstream does not present a per se exigency but must be determined on a case-by-case basis on the totality of the circumstances.").

See Opinion at 12.

The State Prosecuting Attorney seems to argue that exigency with respect to a blood draw is somehow different than exigency to provide an exception for a warrantless arrest without any authority to support that position. Quite simply, a warrant is a warrant, whether it is for blood or an arrest. There is nothing in this record to indicate that it would somehow take longer or any evidence would be compromised in any different manner if the State sought an arrest warrant versus a blood warrant.

It is also important to note that at the trial court and at the Court of Appeals, the Fort Bend County prosecutors never raised exigency with respect to the warrantless arrest in this case. *See* Opinion at 10. In fact, the First Court noted, "Here, the State does not argue that the dissipation of alcohol provided the necessary exigency, either *per se* or based on the particular facts of McGuire's arrest. In fact, the State's position is that no exigency requirement exists at all." *See* Opinion at 10.

So, for the first time, the State Prosecuting Attorney injects this argument where it does not belong. There are two reasons exigency, with regard to the warrantless arrest in this case, was not raised by the Fort Bend County District Attorney's Office in the 2018 proceeding or at the oral argument before the First Court of Appeals. First, both responding officers testified that the gas station

where Respondent was first encountered was not a suspicious place. (Pre-Trial RR2: 53, 109-10). Second, as discussed previously, whether exigent circumstances existed, with regard to the Blood Alcohol Content evidence in this case, has been litigated for years.

Even though the State did not argue exigency at the Court of Appeals, The Court still conducted an independent review of the record and considered the factors advanced by the State Prosecuting Attorney:

> McGuire called his mother from the Shell gas station before he interacted with any police officers, and she drove to the gas station to wait with him. She was available to drive him, should he have been allowed to leave, which meant there was no danger of subsequent driving while intoxicated. Cf. *York v. State*, 342 S.W.3d 528, 536–37 (Tex. Crim. App. 2011) (evidence of defendant's running vehicle warranted reasonable belief that, if defendant were intoxicated, he would eventually endanger himself and others when he drove vehicle home). Moreover, McGuire waited at the gas station for law enforcement to arrive and agreed to ride with the officers to the location where Stidman's body was located. There was no evidence that, after the police engaged McGuire, they held any concern that McGuire would attempt to flee. Cf. *Villalobos v. State*, No. 14-16-00593-CR, 2018 WL 2307740, at *6 (Tex. App.—Houston [14th Dist.] May 22, 2018, pet. ref'd) (mem. op., not designated for publication) (concluding that Article 14.03(a)(1) requirements were met on evidence driver "needed to be detained because he had fled scene of accident").

See Opinion at 12-13.

Even if one engages in the analysis suggested by the State Prosecuting Attorney, the State's argument still fails. As discussed above, there is absolutely no evidence that Appellant would have left the scene *at all*. In fact, the evidence is

to the contrary because he waited for police to arrive *after he called them* and then consented to riding in and remaining in Trooper Wiles's patrol car. Therefore, there is no evidence the blood evidence in this case would have been compromised.

Finally, whether the blood evidence in this case could have been compromised is a moot issue because it was drawn without a warrant and has been suppressed since 2016. *McGuire v. State*, 493 S.W.3d 177 (Tex. App.—Houston [1st Dist] 2016).

III. Conclusion

Both responding officers in this case testified that the place where they encountered Respondent was not a suspicious place. (Pre-Trial RR2: 53, 109-10). However, even assuming, for argument's sake alone, that the gas station in question was a suspicious place, Court of Criminal Appeals' precedent requires a showing of exigency before arresting an individual in a suspicious place without a warrant. Further, the State is unable to show any exigent circumstances which would justify Respondent's warrantless arrest under Texas Code of Criminal Procedure Article 14.03(a)(1).

Quite simply, in trying to turn a location which both officers testified was not a suspicious place into a suspicious place and ignoring the extensive litigation which determined the lack of exigent circumstances to justify a warrantless arrest,

which may have compromised already suppressed blood evidence, the State is trying to fit a square peg into a round hole. Accordingly, the holding of the Court of Appeals should stand.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Court of Criminal Appeals uphold the Court of Appeals' opinion in this case.

Respectfully submitted,

/s/ Kristen Jernigan

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 10, 2020, a copy of the foregoing Respondent's Brief was served by efile to the State Prosecuting Attorney's Office at information@spa.texas.gov.

/s/ Kristen Jernigan
Kristen Jernigan

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the foregoing document consists of 3,236 words in compliance with Texas Rule of Appellate Procedure 9.4.

_____/s/ Kristen Jernigan_____
Kristen Jernigan